PRIVY COUNCIL REPORTS

GOH LENG KANG v. TENG SWEE LIN & ORS.

[Privy Council (Lord Salmond, Lord Fraser of Tullybelton and Lord Russell of Killowen) November 17, 1976]

[Privy Council Appeal No. 2 of 1975]

Practice and Procedure — Claim for possession of land — Defence of adverse possession — Lower courts rejecting defence — Whether Board may interfere with concurrent findings of lower courts.

Privy Council — Appeal to Privy Council — Whether Board may interfere with concurrent findings of lower courts.

The case concerned a small area of land in Lots 250 and 249. The appellant/defendant contended that by adverse possession of the disputed land from 1953 to 1965 as a residence and as a temple, of which ultimately (as possessed by a deity) he was medium and curator, he acquired a twelve year possessory title so as to extinguish the title of the predecessors in title of the plaintiffs. The plaintiffs acquired the paper title to Lot 250 in 1967 and to Lot 249 in 1970, their object being to develop godowns or warehouses thereon.

The case for the defendant was that his residence or temple had stood where it now stands on Lots 250 and 249 since 1953. The plaintiffs' submission was that it had stood in the strip of Lot 260 adjoining until in 1968 the defendant moved it into the disputed land, taking over a chicken house structure and area on Lots 250 and 249 and subsequently renovating the latter into the temple which now stands there.

The lower courts made concurrent findings of fact that the occupation by the defendant of the disputed land began in 1968, so that no title by adverse possession was acquired.

The primary question before the Board was whether there were grounds which justified departure from the salutary rule of practice that the Board would not interfere with concurrent findings of fact in the courts below.

Held, dismissing the appeal: this was a case within the rule of practice as to concurrent findings of fact.

Case referred to:-

(1) *Devi* v. *Roy* [1946] A.C. 508.

PRIVY COUNCIL APPEAL FROM SINGAPORE.

Michael Kempster Q.C. (*T.A. Lebus* and *Harry L. Wee* with him) for the appellant.

Anthony Colman for the respondent.

Lord Russell of Killowen (delivering the judgment of the Board): The primary question in this appeal (in which ultimately a new trial was sought) is whether there are grounds which justify departure from the salutary rule of practice that this Board will not interfere with concurrent findings of fact in the courts below. Their Lordships being of opinion that there are no such grounds the appeal may be dealt with reasonably briefly.

The case concerns a not very considerable area of land in Lots 250 and 249: the appellant/defendant contends that by adverse possession of the disputed land from 1953 to 1965 as a residence and as a temple, of which ultimately (as possessed by a deity) he was medium and curator, he acquired a twelve year possessory title so as to extinguish the title of the predecessors in title of the plaintiffs. The plaintiffs acquired the paper title to 250 in 1967 and to 249 in 1970, their object being to develop godowns or warehouses thereon.

Lot 260 was an area on which there was a school. Below it (in terms of the plans) were lots 249 and 250 adjacent to each other, the boundary between Lots 249 and 250 and Lot 260 being a straight line, with a boundary stone at the point where the three lots coincided. Lot 260 was markedly higher than the greater part of 249 and 250, and the ground sloped quite steeply down from inside 260. In 260 opposite the relevant parts of 250 and 249 was a retaining wall to support the soil which was higher than those relevant parts. On this retaining wall was a fence, and between it and 249 and 250 there was a strip of 260 which the evidence showed was some 20 to 30 feet in width. To the eye it might thus understandably appear that any building on that strip was outside the confines of 260 and within the confines of 250 and 249.

The case for the defendant was that his residence or temple had stood where it now stands on 250 and 249 since 1953. The case for the plaintiffs was that it had stood in the strip of 260 above mentioned until in 1968 the defendant moved it into the disputed land, taking over a chicken house structure and area on 250 and 249 and subsequently renovating the latter into the temple which now stands there.

The concurrent finding of fact is that indeed the occupation by the defendant of the disputed land began in 1968, so that no title by adverse possession was acquired.

Their Lordships having formed the opinion that this is a case within the rule of practice as to concurrent findings of fact it is not necessary to discuss details of the evidence or to seek to weigh the pros and cons thereof. This Board is not in those circumstances merely a Court of Appeal from the conclusion: and indeed, if it were, it is relevant to remark that the trial judge had the advantage both of observing the witnesses and their method of giving evidence, of which he took advantage by expressly disbelieving the defendant and expressly accepting the evidence of certain witnesses for the plaintiffs, and also of viewing the *locus in quo*. Nevertheless their Lordships consider it appropriate to refer briefly to some of the evidence as it appears from the learned judge's notes thereof.

Witness PW7 (Eu), a broker, took Teng (Witness PW9) and Lim round 250 in 1967, those two being concerned on behalf of the plaintiffs who ultimately bought 250. He said that on the area marked blue (the disputed land) on a plan there was then a structure used for poultry with plank walls and a ridged asbestos roof used by a tenant Emaran of the owners of 250, for vacation of which (*inter alia*) Emaran was paid $600 when the plaintiffs bought. This structure, he said, extended (as does the disputed land) over the boundary between 249 and 250: there was (he said) at the same time on Lot 260 opposite the disputed land a shed used by the defendant for worshipping, on a higher level than that of the chicken structure. Eu had on this occasion identified the boundary stone at the point where the three lots 260, 250 and 249 met — a statement that was apparently not challenged — and so was in a position not only to recognise (as he did) that there was an extension in respect of the chicken structure beyond 250 into 249, but also that the shed which he said was then used for worshipping was in 260. Eu stated that in 1968 the defendant removed his temple or worshipping shed from 260 to

the chicken site (the disputed land) and later in that year renovated it to its present condition. He said that he found between August and October 1968 that the defendant had erected on 250 wooden steps leading to the disputed land, which Eu promptly demolished. At this the defendant warned him not to interfere or his livelihood might suffer and Eu indicated in evidence that this alarmed him, which was why he did not report the encroachment to the plaintiffs his employers, who dismissed him in 1969 when they found out. Their Lordships do not consider that the failure to report to his employers is a ground for thinking that Eu's evidence of encroachment by the defendant was fabricated: it may well be that threats by a temple medium possessed by a deity are intimidating, and the notes of Eu's evidence show a consistent story.

Witness PW9 (Teng) was the husband of one plaintiff and probably beneficially entitled to her share. He accompanied PW7 (Eu) on inspection of 250 in 1967. His evidence as to the then situation of the chicken structure and pen coincided with that of PW7, as to its structure, the protrusion a few feet into 249 and its location on 250, with reference to the boundary stone to which he said the chicken pen approached within about 1 foot. He also stated that there was then a shed used as a temple in 260 on higher ground, whose position he roughly marked on a plan as a few feet inside 260. He first saw the temple in its present position and renovated condition in December 1969, interviewed angrily PW7 and dismissed him for not telling him of the move of the temple to the disputed land: on that occasion PW9 said that PW7 gave the same reason for not telling him as the latter gave in evidence. His evidence as to compensation of Emaran for vacating the chicken structure/pen was the same as that of PW7 (Eu).

Witness DW2 (Tan) gave evidence of construction and renovation of a building for the defendant and for a temple many years before and placed it on the disputed land. He supported his evidence by saying that the school on 260 had a barbed wire fence and so "would not allow you to put a shed up there". This appears to their Lordships to indicate that he thought that the retaining wall was the boundary of 260 whereas the wall was 20 to 30 feet inside the boundary. The subsequent levelling of the school site (260) and demarkation of the true boundary as excluding the present site of the temple on the disputed land might well have led this witness and others to conclude that the temple was in an unchanged site.

Witness DW3 (Yeo) spoke of the defendant's premises being on the disputed land years ago: but he placed it as within 7 or 8 feet of the retaining wall, which would be within 260.

Witness DW6 (Lim) said that the defendant's premises were "as far as I know" in the same place as many years ago: but he said that those premises were at most 1 or 2 feet from the retaining wall which he assumed was the boundary of 260: so that he also by that estimate of measurement placed the premises as previously within 260.

Witness DW7 (George Ho) was the architect concerned with the rebuilding of the school on 260. He said the boundary stone already mentioned was 20 to 30 feet beyond the retaining wall: he thought the present temple was in the same place now as was the defendant's building then: he was unable to say how far the defendant's building was from the retaining wall — which was levelled off when the site of 260 was prepared for the school rebuilding. He worked on a plan based on a survey in 1964 by DW10 (Moorthy) which showed a building in 250 and 249 on the boundary with 260 and did not show any building on the relevant part of 260.

Witness DW9 (Soh) was a small contractor: his evidence shows that he thought that the boundary of 260 was the fence along the retaining wall, and not unnaturally thought that the present temple had not moved: but he said that the defendant's building was within 2 to 3 feet of the retaining wall — "very close" to it — and expressed himself as quite sure of that: that estimate also places it within 260.

DW10 (Moorthy), a surveyor, made a survey in 1964 of the area in connection with a projected rebuilding of the school on 260. His survey plot (page 106 of Volume II of the Record) placed a building on the disputed land which he described on the plot as "plank and asbestos house" — compare the description of the chicken structure by PW7 (Eu). DW10 said in evidence that it was then occupied, but could not say by whom. He said it was his responsibility to pick up any building within 10 feet either side of the 260 boundary, in connection with which the distance of 20 to 30 feet from the retaining wall to the boundary of 260 and estimates of distances of the defendant's building from the retaining wall already mentioned will be recalled, which perhaps make it not wholly certain that the defendant's building would have been "picked up" in the survey. Nevertheless DW10 said in evidence, and the courts below were content to accept it, that there was then no building between the retaining wall and the boundary of 260 and that he would surely have picked it up had there been one because he included in his survey the retaining wall. The trial judge and the Court of Appeal solved this problem by concluding that the defendant's temple shed on 260 which according to PW7 and PW9 was there in 1967 appeared there after Moorthy's survey. This theory of course conflicted with evidence not only of the defendant but of his other witnesses which placed him for long as an occupant of a shed or house on any footing outside the retaining wall, and it was suggested that the only possible conclusion was that Moorthy's "house" and the evidence of "no change" by the defendant and other his witnesses must override the evidence of three of the defendant's witnesses as to proximity to the retaining wall and that of PW7 and PW9 as to the situation on that ground in 1967: but this was not accepted by the courts below.

Finally DW11 (Wee), a photogrammatic engineer, produced an R.A.F. photograph of the area taken in 1958 from which he produced a photogrammatic plot from which he said that the present position of the temple is shown as such in 1958: the courts below were unable to accept this as necessarily showing any temple building (as distinct from a chicken structure): nor are their Lordships.

On the basis of the evidence thus briefly summarized the trial judge, in a judgment which in a case

of complicated and conflicting evidence spread over a very long period was unlikely to be proof against criticisms of detail, and the Court of Appeal in (their Lordships say with respect) a judgment of the court that deployed more concisely the relevant considerations, both came to the conclusion that the defendant's story of adverse possession of the disputed land was not sustainable. This is not a matter of onus of proof: it is a question of decision on fact on the evidence in the instant case. The conclusion was that the defendant had not occupied or possessed the disputed land for a period of 12 years from 1953 to 1965 which he alleged as the basis of his case for acquisition of title and extinction of the title of the predecessor of the plaintiffs under the relevant legislation.

For the appellant/defendant the principal burden of the argument rested upon a passage at page 177 of Vol. I of the Record in the trial judge's judgment, and in part repeated at page 187. Their Lordships quote those passages:

"The strength of the plaintiffs' case is that they purchased Lots 250 and 252 in August 1976 from their predecessors in title subject to the existing tenancies and without notice of any claim. The tenants of Lots 250 and 252 are enumerated in Exhibit B3. The defendant's name does not appear in B3 and if he was on either Lot 250 or Lot 252 he was there as a trespasser. If the defendant as he alleges was in undisturbed continued possession from 1953 to 1965 it is indeed strange that he waited 5 years to stake his claim. Again the plaintiffs purchased Lot 249 in December 1970 with notice of the defendant's claim but the plaintiffs' predecessors in the title i.e. the Finance Company purchased Lot 249 in 1965 with vacant possession which means the defendant was not on Lot 249 at the material time — 1965. Such being the case I rejected the submission of counsel for the defendant that the title to the disputed land was complete 12 years before action was brought by the plaintiffs. The plaintiffs' right and title to the land had never been extinguished: hence the onus is on the defendant to prove that he was in continued undisturbed possession for the statutory period i.e. from 1953 to 1965." "There was also evidence that the plaintiff purchased Lots 250 and 252 from their predecessors in title in 1967 when they were given a list — Exhibit B3 — of the occupiers of those lots from whom rents were being collected. Oddly enough the defendant's name was not in that list and this is indeed very strange for this disputed land is 30-40 feet above ground level and from it you have a panoramic view of Lots 249 and 250. Such being the case the plaintiffs' predecessors in title of Lot 249 in 1965 i.e. the Finance Company and the plaintiffs themselves when they purchased Lot 250 in August 1967 would not have failed to observe this structure if it had been there. Why was his name omitted from B3, why was rent not collected from him?"

Their Lordships agree that these passages disclose error in law in the evaluation of evidence. Neither the absence of the defendant's name from the list of tenants in the Answer to requisitions on title on Lot 250, nor the fact that when the plaintiffs' predecessors in title bought 249 they bought with vacant possession, are of any probative value to exclude the possibility that the defendant had acquired a squatter's title. Their Lordships however are not able to accept that these approaches contributed significantly to the learned judge's ultimate conclusion, which he formed on the basis of his view of the witnesses and their reliability in their evidence; nor are they able to accept the submission that these errors misled the trial judge into an adverse view of the witnesses and their reliability. Their Lordships observe that counsel for the appellant, who put these passages in the forefront of his argument. appeared also before the Court of Appeal: his criticisms of those passages must have been equally stressed before the Court of Appeal, and their Lordships cannot believe that in the course of reservation of that court's unanimous judgment those criticisms were overlooked. Nevertheless the conclusion of that court was not merely that the decision of the trial judge should not be interfered with (he having observed the demeanour of the witnesses and seen the site), but that his conclusion was the right one.

Apart from the matters last mentioned it was submitted for the defendant/appellant that the theory of the "peripatetic" temple was so improbable that it must be rejected. Their Lordships are not persuaded by this. On one view of the evidence there was just below the defendant's temple shed a fairly flat area, with an unoccupied erection ready concreted, with possible access downhill to a road for worshippers, and at the moment (in 1968) not being used, with levelling disturbance on Lot 260. Their Lordships do not find it difficult (nor did apparently the courts below) to think that in those circumstances the temple medium would think it convenient to move in.

At one time their Lordships were concerned why the plaintiffs (if satisfied that the defendant had not acquired a squatter's title) were prepared (as they were) to buy out the defendant for $40,000. But the course of this litigation, combined, for all their Lordships know, with the fact that the disputed land was in use as a temple, may well have disposed the plaintiffs to make what proves to have been an extravagant offer.

Their Lordships have not here discussed the principles, best set out in the case of *Devi* v. *Roy*[1] on which the practice of non-interference with concurrent findings of fact is based. Suffice it to say that their Lordships do not consider that this case falls within the exceptions there expressed, nor within any exception that might be added having regard to the fact that it is not a cast iron rule.

Their Lordships are of the opinion that this appeal fails and accordingly it will be dismissed with costs.

Appeal dismissed.

Solicitors: *Parker, Gazzett & Co.; Jaques & Co.*